is that it was available to interpret its *own* "rules or definitions." The Commission offering to interpret its own "rules or definitions" is a far cry from instructing that it be the sole expert agency charged with interpretation of a statute.

Congress clearly intended, and the Commission has expressly recognized, that disputes such as the present one should be resolved in local trial courts pursuant to the local jurisdiction's consumer protection and/or contract laws. Both are present here. Plaintiffs have appropriately brought suit against TWC alleging that it has engaged in unlawful negative option billing in violation of California's consumer protection law, the UCL. In addition, TWC itself has consistently taken the position throughout this litigation that the present dispute is governed by the terms of the integrated written contract between TWC and its California customers. TWC has repeatedly argued that its standardized Subscriber Agreement and Work Order define and control the entire relationship between itself and its California customers.[6] TWC's designated PMK, David Su, has testified as follows:

> Q. . . . Is it your understanding, as the PMK, that the subscriber agreement and the work order control the relationship between Time Warner and the customer?
> A. Yes.

(Exh. 7, Depo. of David Su (TWC PMK) at p. 57/17-20). Accordingly, as intended by Congress, and recognized by the Commission, each of the issues raised in this litigation and raised in TWC's Petition here are most appropriately addressed to and resolved by the local state trial court, not the Commission or any other agency.

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[6] (Exh. 6) TWC's Subscriber Agreement provides: "(1)(a) This Agreement, [and] the Work Order, . . . constitute the entire agreement between TWC and me. This Agreement supercedes all previous written or oral agreements between TWC and me."

D. Congress Has Charged Local Franchising Authorities With Resolving Negative Option Billing Disputes, Not the Commission

TWC repeatedly states, with no supporting authority, that Congress has "charged the FCC with the authority to interpret and enforce . . . the regulatory prohibition against negative option billing in 47 U.S.C. §543(f)." Congress may have given the Commission authority to resolve negative option billing disputes between cable operators and their customers in 1992, but Congress took that authority away in 1996 with the passage of the 1996 Telecommunications Act. 47 U.S.C. §§543(a)(1) and (b)(5); See also: Federal Communications Commission Fact Sheet: Cable Television Information Bulletin (June 2000) ("FCC Fact Sheet"), at 26 ("several areas of regulation are administered by local franchising authorities rather than by the Commission. These include . . . equipment and customer service, . . . bills and billing practices"). The fact is that the Commission no longer has authority to resolve negative option billing disputes arising from alleged violations of §543(f). See: FCC Fact Sheet at 26; FCC Publication, "Regulation of Cable TV Rates: FCC Consumer Facts,"(Local Franchising Authorities, not the Commission, resolve "complaints about bills"). Such disputes are to be "directed to local officials," not the Commission. FCC Fact Sheet at 26. According to the FCC Fact Sheet, "the local franchising authority [not the Commission] will review the charges for basic cable service and ***equipment*** to determine if the charges are justified." FCC Fact Sheet at 26 (emphasis added). Pursuant to the 1996 Telecommunications Act, the Commission's authority to accept and resolve complaints about equipment charges "was terminated on March 31, 1999." *Id.*[7]

[7] In addition, even during the brief period of time that the Commission had authority to receive complaints concerning equipment billing practices, the Commission took the position that disputes

TWC's claim that the Commission has instructed that interpretation of 47 U.S.C. §543(f) is "appropriately resolved by the Commission as an expert agency," ignores the true language of the 1993 FCC Rate Order, which provides:

> However, our existing procedures would ***also be available*** in cases involving, for example, ***interpretation of our rules or definitions***, that would be more easily and *appropriately resolved by the Commission as an expert agency.*

1993 FCC Rate Order at 5905. Clearly, what the Commission instructed is not that it should be charged with interpretation of §543(f), as TWC claims. What the Commission instructed in 1993 is that it would be available to interpret its *own* "rules or definitions."

Despite the fact that the Commission could not have resolved the present dispute in the first instance, TWC argues that, after 2 ½ years of litigation in the proper forum for these disputes (i.e., the local trial court), now, since it did not receive the response it wanted from the trial court, the present litigation should be stopped in its tracks so that TWC may seek a third opinion from the Commission. Defendant failed and refused to bring the present dispute before the local franchising authority as Congress commanded, and has twice brought these exact issues before the local trial court. Now is not the time, nor the Commission the appropriate forum, to allow TWC to impermissibly delay the present litigation and shop for a more receptive forum.

E. The Issue Of Whether TWC Complies With §543(f) Turns Upon The Legal Interpretation Of TWC's Integrated Contract Under California Law

At its core, the present dispute is a contract dispute. Resolution of the present dispute turns centrally upon an interpretation of TWC's standardized integrated contract between itself and its California customers. TWC drafted and imposed upon each of its California customers a

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arising under §543(f) are "contractual in nature" and should be "redressed in local courts." 1993 Rate Order at 5905.

standardized contract consisting of a Subscriber Agreement and Work Order which each customer is bound by, and which, according to TWC and the Subscriber Agreement itself, controls the entire relationship between the parties. That contract contains a standard complete integration clause which provides that the parties may not look to any evidence outside the words of the contract itself to interpret their contractual relationship. TWC's integration clause provides that the written contract "supercedes" any oral agreements between the parties related to the subjects covered by the contract.

1. The Interpretation of TWC's Integrated Contract Is Within the Exclusive Province Of the California Court Under California Law

Whether or not the Subscriber Agreement operates to preclude evidence of oral requests or oral agreements for equipment is a question of interpretation of California contract law appropriately decided by a California state court. It is Plaintiffs' position in this litigation that, despite the fact that TWC now asks the court and the Commission to review its oral sales practices, its own integrated adhesion contract prohibits such a review. It is Plaintiffs' position that any agreement by any TWC customer in California to receive and/or pay for either a converter box or remote control, or any evidence of any affirmative request for such equipment, must be found in, and only in, TWC's integrated contract documents. Whatever the ultimate resolution is to this contract issue/dispute, it is clearly one that the local trial court, not the Commission or any other agency or tribunal, must decide in the first instance. *Cal. Civ. Code* §1646 ("A contract is to be interpreted according to the law and usage of the place where it is to be performed."); See also, Restatement 2d of Conflict of Laws (2010), §188 ("If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied") and §204 ("When the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the words will be construed . . . in accordance with the local law of the state selected by application of the rule of §188."). Hence, any dispute that involves the interpretation of any portion of TWC's integrated contract with its California customers, as this dispute undeniably does, must be addressed to and decided by the Superior Court of the State of California.

2. Pursuant To the Express Terms of Its Subscriber Agreement, TWC Relinquished Any Right It Had Under 47 C.F.R. §76.981 To Obtain a Subscriber's *Oral* Affirmative Request For Equipment

While 47 C.F.R. §76.981 initially may have given TWC a right to obtain a subscriber's affirmative request for equipment either orally or in writing, TWC expressly contracted away and gave up the right to receive an *oral* request by the express terms of its Subscriber Agreement, which provides:

> (1)(a) This Agreement, [and] the Work Order, . . . constitute the entire agreement between TWC and me. ***This Agreement supercedes all previous written or oral agreements between TWC and me.*** I am not entitled to rely on any oral or written statements by TWC's representatives relating to the subjects covered by these documents, whether made prior to the date of my Work Order or thereafter..."
>
> (Exh. 6, Subscriber Agreement (June 23, 2006 version) p. 2, ¶1.)

Thus, any oral agreement between TWC and any of its California customers has been effectively and expressly superceded by the TWC Subscriber Agreement. Such "agreement" would naturally include any agreement or "consent" or "assent" on the part of the customer to receive equipment. Likewise, any dispute related to the agreement between TWC and its California customers related to the provision of cable television service and related equipment is governed by, and at the very least involves an in-depth analysis of, TWC's integrated contract documents. The "entire agreement" between TWC and its California customers is contained exclusively within the four corners of TWC's contract documents. Any dispute related to that agreement, and the relationship between the parties, necessarily is "contractual in nature," and involves a constructive and interpretative analysis which must be conducted only by the California Superior Court.

In addition, TWC's main argument here is that it informs its California customers of the equipment they will receive and the related cost thereof, and obtains their consent to receipt thereof. This act of "informing" its customers about the equipment they will be charged for, TWC contends, is performed orally during sales conversations between TWC's CSRs and its California customers. The act of being so "informed" thereafter forms the basis of the customer's alleged "consent" or "assent" to receipt of their equipment. Without being informed, their could be no "consent" or "assent." TWC's customers must know what they are consenting to. One cannot consent to something they are not aware of. Hence, TWC's "informed consent" theory.

However, by the express terms of TWC's integrated contract, its California customers are specifically prohibited from relying on any oral statements made by any TWC representative related to any subject covered by the Subscriber Agreement or Work Order. The rental of equipment is clearly a subject covered by the contract.[8] Accordingly, even if "informed consent" were the standard here, which it clearly is not, TWC's California customers cannot be found to have been informed of, or to have consented to, something they have been told they are not

[8] TWC itself argues that the Work Order, which is part of its integrated contract, covers the rental of converter boxes and remotes.

entitled to rely on. If TWC's customers are to be held to have consented to something they allegedly have been informed of, that information which forms the basis of their being "informed" must, according to the express terms of TWC's contract, be found in the contract. It is not. Nevertheless, this contract issue/dispute must be resolved by the California trial court.

F. TWC Has Failed To Establish That The Requested Declaratory Ruling By The Commission Is Required And Will Serve The Public Interest

47 U.S.C. §543(f) plainly and unambiguously requires an "affirmative request by name," not "informed consent," as TWC argues. If Congress had wanted cable companies to obtain a customer's "informed consent" for equipment before being permitted to charge the customer for that equipment, Congress presumably would have said so. It does not take an English scholar to recognize that "affirmative request by name" does not mean "informed consent." However, TWC, in an attempt to legitimize its unlawful conduct over the past 18 years urges the Commission to re-write the words of both the statute and its implementing regulation in a way that is simply inconsistent with the plain meaning of the statute so that it may continue to charge its customers for equipment which those customers have not affirmatively requested by name. TWC's argument essentially says to the Commission, if you don't think we have complied with the letter of the law, simply re-arrange the letters. This unilateral attempt to force its unlawful conduct to be deemed lawful would serve only TWC's interest, not the public's.

TWC attempts to convince the Commission that the Commission's opinion on the issues presented here is essential to avoid "varying and conflicting interpretations of" §543(f). The trial court in this case has interpreted the language of §543(f), which requires an "affirmative request by name," to require an "affirmative request by name." There is no risk of varying interpretations of the words of a statute when, as here, those words are interpreted to mean exactly what they say.

Next, TWC disingenuously attempts to convince the Commission that its recommended re-wording of §543(f) would actually be in "the public interest," and would serve "the pro-consumer intent" of §543(f). It can hardly be in the public interest, or in any way serve the interests of consumers, to re-write the words of a federal consumer protection statute, as well as its implementing regulation, to simply fit the way one cable operator has chosen to do business. Requiring cable operators to comply with the law by demanding that they adhere to "the statutory obligation to solicit an affirmative request by the customer" will give full effect to the intent of Congress. *Time Warner Cable v. Doyle* (7th Cir. 1995) 66 F.3d 867, 877 ("*Doyle*"). Requiring adherence to the plain language of both the statute and its implementing regulation will not, as TWC argues, make the process of ordering cable service "overly costly, cumbersome [or] confusing." Uniformity in application of §543(f) is best and most easily achieved by simply enforcing the words as Congress wrote them. The public's interest is best served, and the nation's cable television consumers are best protected, by demanding adherence by cable operators to the exact words that Congress chose. TWC's attempt to convince the Commission that it would be in consumers' best interests to re-write the words of a federal consumer protection statute because it has failed and refused, for 18 years, to faithfully adhere to those words, is troubling to say the least. The Commission should summarily decline that invitation.

V. TWC's Common Sales Practices Do Not Satisfy 47 U.S.C. §543(f)

If the Commission decides to issue an opinion concerning whether TWC's ordering process complies with the negative option billing restriction of §543(f), then the Commission should look only to TWC's integrated contract documents for the answer and not to oral sales conversations.

While it is expected that TWC will argue that the trial court has indicated that it may allow TWC to present evidence of oral affirmative requests, this issue in fact has not been formally brought before the court for a decision and the court has not decided the issue. The issue will most likely be decided by the court in the upcoming motion for class certification scheduled for hearing on February 14, 2011, on Plaintiffs' expected motion for summary judgment, or in a motion in limine immediately prior to trial. However, the question of whether the integration clause in TWC's standardized contract with its California customers has the legal effect of forbidding introduction of evidence by TWC of alleged oral affirmative requests is clearly an issue for the court to decide and has not yet been decided by the state trial court.

A. The Evidence In This Litigation Establishes That TWC's Uniform, Standardized Documents Do Not Satisfy §543(f)

An affirmative request for equipment must be found in either a written document or an oral statement. 47 C.F.R. §76.981. TWC's written contract prohibits any reference to or reliance upon any oral statements related to any subject covered by the contract. Because converters and remotes are clearly subjects covered by the contract, any affirmative request for equipment must therefore be found in, and only in, TWC's written contract.

1. TWC's Compliance With §543(f) Must Be Found, If At All, In Its Integrated Contract Documents

TWC's "informed consent" theory argues that, after being informed by its CSRs of the equipment they will receive, each customer orally agrees to the receipt of that equipment before signing a Work Order at the time of installation. However, the Subscriber Agreement, the terms of which are incorporated into that same Work Order, expressly provides that the written "Agreement supercedes all previous .. oral agreements between TWC and [each customer]." Thus, any purported oral agreement made by any customer prior to signing the Work Order, including any agreement for the receipt of equipment, has been expressly superceded and rendered meaningless. Any valid and enforceable agreement, therefore, must be reflected in the contract documents. As demonstrated, there is no such agreement.

TWC's standardized Subscriber Agreement contains the following provision:

> "(1)(a) This Agreement, [and] the Work Order, . . . constitute the entire agreement between TWC and me. This Agreement ***supercedes*** all previous written or oral ***agreements between TWC and me.*** I am not entitled to rely on any ***oral*** or written ***statements*** by TWC's representatives ***relating to the subjects covered by these documents***, whether made prior to the date of my Work Order or thereafter . . ."

(Exh.6, Subscriber Agreement). Thus, pursuant to the terms of the contract drafted by, and imposed upon each class member by, TWC, the Subscriber Agreement and Work Order constitute the entire agreement between TWC and each of its California customers, and supercede any prior oral agreements between the parties. Each customer is therefore prohibited from relying on any oral statement made by any TWC representatives "relating to the subjects covered by" the Work Order and/or Subscriber Agreement.

The result of TWC's integrated contract is that no customer may rely on anything any TWC CSR has said orally. Pursuant to the terms of TWC's contract, anything any CSR said to any customer over the telephone is made irrelevant and rendered meaningless with respect to any "subject covered by" the Contract. TWC argues that by signing the Work Order, each customer in fact has affirmatively requested any equipment listed thereon. It is indisputable that converters and remotes are "subjects covered by" the Work Order. As such, any oral statements made by either TWC (and its employees) or any customer related to converters or remotes are superceded by the contract. Exh. 3, TIMF Nos. 30 and 31. No customer, therefore, can be seen to have "consented" to anything that was communicated to them orally about equipment when they have subsequently been contractually prohibited from relying on any information that was allegedly communicated to them.

TWC nonsensically argues that its CSRs inform each customer that they will receive certain equipment and pay a monthly cost therefor, and that each customer then orally ***agrees*** to order their cable service with the knowledge that they will be paying extra for equipment. However, the contract documents drafted by TWC provide that no customer may rely on any oral statements made by TWC. It is axiomatic that one cannot "agree" or "consent" to something they are told when they are not permitted to rely on anything they are told.

Because converters and remotes are "subjects covered by" the contract, any oral statements related to converters and/or remotes are now superceded by the terms of the contract. It follows that if TWC wishes to rely on any disclosure to its customers related to equipment, that disclosure must be found in the contract, not in any superceded oral statements. Likewise, any affirmative request by a customer for either a converter or remote must be found in the contract because anything the customer may have said to TWC orally is also superceded by the contract. Therefore, any affirmative request, and/or evidence of any such request, must be contained in either the Work Order or the Subscriber Agreement, or there simply is no affirmative request. TWC may have had the right to obtain a customer's affirmative request for equipment orally prior to execution of its contract documents, but, it intentionally relinquished that right by drafting, entering into, and foisting upon each of its customers an integrated contract that supercedes any oral agreements related to equipment, and prohibits reliance on any oral statements related to that equipment.

2. TWC's Integrated Contract Documents Do Not Constitute or Evidence an Affirmative Request for Equipment By Any Customer

A review of both TWC's standardized Subscriber Agreement and its standardized Work Order reveal that by simply signing the Work Order, which incorporates the Subscriber Agreement, TWC's customers have not thereby affirmatively requested anything.

TWC does not contend, nor could it, that either the Subscriber Agreement, the Terms of Use or any Tariff contains, much less evidences, an affirmative request for equipment by any customer, or that either of those documents informs customers of the actual equipment that they will receive and be charged for. Therefore, the only document the Commission must consider to determine whether TWC has met its "statutory obligation to solicit an affirmative request by the customer" is TWC's standardized Work Order. *Doyle*, 66 F.3d at 877. A simple, honest reading of the Work Order, however, reveals that it does not contain an "affirmative request by name" by any customer for a converter or remote.

TWC has not argued that its Work Orders contain an affirmative request by name by any customer for a converter or remote. Nor has TWC argued that its Work Orders themselves constitute an affirmative request. Rather, TWC argues simply that its customers have "re-confirmed" some previous request for equipment, and that the Work Orders provide *"further proof"* of that previous request. In other words, TWC argues that the Work Orders are circumstantial evidence (i.e., "further proof") from which the Commission should infer that its customers previously requested their equipment. TWC argues that its customers affirmatively request their equipment when they place their orders with TWC's CSRs, and that the Work Orders are "further proof" they did so. This argument, however, does not reflect the fact that TWC may not look to anything outside of the contract documents, including oral conversations between its customers and its CSRs, for evidence of an affirmative request.

In addition, the equipment that TWC's customers received and were charged for is either not listed at all on their Work Orders, or listed in such an abbreviated, cryptic and unintelligible fashion that even TWC's own CSRs cannot decipher what equipment has been ordered or delivered. (Exh. 3, TIMF Nos. 44, 45). For example, the equipment supposedly listed on Plaintiff Swinegar's Work Order does not list the remote at all, but simply lists "DGTL RCVR PK," which, TWC argues, should be clear to anyone that Swinegar requested both a converter and remote, even though neither word is ever used. (Exh. 3, TIMF No. 44) (See Exhibit 8, Swinegar Work Order). The words "converter box" or "remote" do not appear anywhere on Swinegar's Work Order.

Not even TWC's own CSRs who take the actual orders, and input the information that generates them, can tell what equipment is delivered to, or ordered by, its customers.[9] Further, when Dezes called TWC in September 2007 to place her order, she did not request any services or equipment related to her cable television, she only requested the addition of internet service. (Exh. 3, TIMF Nos. 43, 50). In addition, according to TWC's own witness, Plaintiff Dezes did

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[9] CSR Mike Pemberton testified as follows: "Q: Are the converter boxes that Ms. Dezes had before the tech went to her house on September 29, '07 being changed that day? A: There should be no reason to change the actual boxes. Q: Were they changed on that day? A: I don't know. Q: You can't tell from the work order? A: No, I can't." (Exh. 9, Depo. of M. Pemberton at 105:19-106:2.)

not request either a converter or remote when she called TWC to order service in September 2007. (Exh. 3, TIMF No. 51). Therefore, since she in fact did not request either a converter or remote when placing the order that generated her Work Order, that Work Order cannot be read to include, or even evidence or "re-confirm," an affirmative request that indisputably never occurred.

TWC asks the Commission to read its Work Orders as if they were receipts for equipment. However, if TWC wanted the Work Order to operate as an affirmative request for, or an acknowledgment of receipt of, equipment, TWC could and should have drafted it that way. The Work Order is just that: a work order. It is not a "receipt for equipment." It is not an "equipment order" or an "acknowledgment of request for services and equipment." It is a description of, or at best a receipt for, "WORK TO BE PERFORMED." (Exh. 3, TIMF No. 45). It does not list "equipment to be provided," or "equipment ordered" or "requested." An honest review of the Work Orders reveals that no reasonable consumer would believe that by signing it they were confirming that they affirmatively requested by name any piece of equipment. (Exh. 3, TIMF No. 45). Not even TWC's own employees can tell what equipment is listed.

B. The Evidence In This Litigation Establishes That TWC's Common Sales Practices Do Not Satisfy Section 543(f)

TWC advances many varied and inconsistent versions of what it deems amounts to "an affirmative request by name." On the one hand, TWC contends that Section 543(f) is satisfied "so long as subscribers are not billed for cable services or equipment *they did not order*." (Petition p. 6). On the other hand, on the same page of its Petition, TWC concedes that "**the customer must affirmatively request the named cable service and/or equipment, having**

been told that charges will apply." Again, Plaintiffs agree that where a subscriber affirmatively requests his or her equipment by name before being charged, TWC has complied with the statute. Unfortunately, the above-described scenario does not exist for TWC consumers of cable television service. Rather, TWC decided over 18 years ago that it would ignore §543(f)'s requirements and institute its own lower standard of "assent" or "informed consent."

TWC explains its position by stating that so long as a customer "knowingly ordered" cable equipment and "selected" his or her service and equipment where the price had been fully disclosed, that sufficient compliance has occurred. (Petition at p. 6). First, "knowingly ordering"equipment when combined with "knowingly selecting equipment," where the price for each piece of equipment is actually selected and actually ordered - is significantly more than mere "assent" or even "informed consent." While Plaintiffs do not believe that subscribers must use magic words in order for a cable operator to comply with the statute, TWC must nevertheless comply. Clearly, TWC's documents and uniform practices over the past 6 years do not constitute compliance. Moreover, and after reading TWC's latest characterization of its own conduct, it is evident that TWC's documents and uniform practices do not ensure in any way that subscribers "knowingly order" and/or "knowingly select" their equipment. Moreover, TWC offers no evidence to support this conclusion.

TWC requests that the Commission issue a declaratory ruling that its practices as outlined in the introductory section constitute compliance with §543(f). First, assuming TWC is referring to the indented "TWC's general recommended practices" section of its Summary at p. ii, there is no evidentiary support to determine that such alleged practices are actually the practices of TWC, much less that these alleged practices are followed. Second, the "practices" alleged ignore other practices of TWC, and ignore the fact that CSR oral agreements with subscribers for the provision of cable equipment or services have been superceded by TWC's written contract documents themselves. Finally, the cited "practice" hardly constitutes compliance with the statute.

1. Remote Control Devices

The undisputed evidence produced in this litigation shows clearly and indisputably that no TWC customer affirmatively requests the remote controls which they are separately charged for, or that they are even "informed" that they will receive and be charged extra for a remote. The uncontroverted evidence shows that no TWC customer is ever even informed that they will pay a separate fee for the rental of a remote. (Exh. 3, TIMF Nos. 68, 69, 93, 94). The undisputed evidence shows that each TWC customer is simply provided with one remote for every converter that is included in their order. (Exh. 3, TIMF No. 70). TWC customers are not asked if they want a remote. They are not told they are going to get a remote. They are not told they will pay an extra, separate monthly rental fee for a remote. They are simply given one, and then billed for it. (Exh. 3, TIMF Nos. 68, 69, 70, 93, 94). This business practice by TWC is the quintessential definition of "negative option billing," and is specifically the type of business practice which §543(f) was designed to prohibit.

In denying TWC's Motion for Summary Judgment, the Court found:

> . . . Defendant's customer service representatives are not trained to inform, and do not inform, customers that they will receive a remote with every converter, or that they will pay a separate monthly fee for each remote they receive. ([Undisputed Material Fact] UMF 94).

(Exh. 2, Order re MSJ at 4:18-23., Exh. 3, Plaintiffs' Separate Statement). The court's ruling was supported by ample and undisputed evidence introduced through the testimony of TWC's own witnesses, testimony and evidence TWC now conceals from the FCC.

2. Digital Programming Fees

The evidence has revealed that TWC charges each customer a mystery fee it refers to as a "digital programming fee" which adds anywhere between $1 and $2.71 extra to the monthly cost to rent each converter over and above the first. For example, in 2007 Plaintiff Dezes rented two converters. She paid $4.01 for the first converter and $6.72 for the second converter. The difference in price between the 1st and 2nd converters of $2.71 is simply this mysterious "digital programming fee." In fact, no TWC witness has been able to provide a sensible explanation for this fee. When asked about the digital programming fee, TWC's CSR Mike Pemberton testified:

Q And what's a digital programming fee for?
A The digital programming fee is a $2 charge that's applied to each additional cable box.
Q Do you know why that's applied?
A I don't know the specifics on what exactly a digital programming fee is.
Q In general, what's it for?
A It essentially makes the box $2 more per.
Q I know. But why?
A That is its price. I've never really been told that the digital programming fee does anything except the fact that it needs to be applied to each additional box, which is what makes it more expensive. . . .
Q Is there something that the company does that they are actually doing some additional digital programming on those additional boxes that they don't do on the primary box?
A If they do, they've never made that clear to us.

(Exh. 9, Deposition of Mike Pemberton ("Pemberton Depo.")at 100:6 - 101:21.)

TWC also conceals this "mystery fee" from its customers. TWC's CSRs have testified at deposition that they "are not trained to discuss the digital programming fee with customers," before charging them. (Exh. 4, Smith Depo., p. 127/6-8). These charges suddenly appear on subscribers' bills without any prior mention by TWC in its contracts and no mention by its CSRs (since they are not trained to disclose it). Plaintiffs assert this is a violation of statute and that moreover, these fees can be fairly characterized as "mystery fees" and/or can result in "bill shock" to the customer. Given that one of the Commission's primary goals is to empower consumers, TWC must be made to comply with §543(f) and obtain each customer's affirmative request for whatever service or equipment this mystery fee is charged for. TWC must conform its practices to the statute, not seek to change the words of the statute to conform to its practices. Compliance should not be looked upon as an "undue burden" on cable operators or something to circumvent, it should be looked upon as an opportunity to ensure the protection to which Congress decided every consumer is entitled.

3. Converters

TWC does not contend that it only charges its customers for equipment which its customers have "affirmatively requested by name," as §543(f) requires. Rather, TWC contends that it charges its customers for equipment after merely receiving the customers' "consent" or "assent" to receipt of the equipment, and that this should be sufficient to satisfy its "statutory obligation to solicit an affirmative request by the customer." *Doyle*, 66 F.3d at 877. However, the plain language of the statute and its implementing regulation, as well as the authority cited to and relied upon by TWC, dictate otherwise.

TWC contends that its common, "recommended" sales practices should be found to constitute compliance with §543(f). Those common, "recommended" sales practices, according to TWC, are reflected in the "sample dialogue" used by TWC's CSRs which is attached as Exhibit 1 to the accompanying Declaration of William H. Johnson. According to TWC, that dialogue, "or any substantially similar dialogue between a CSR and potential customer, would comply fully" with §543(f). However, a plain, honest reading of TWC's common sales dialogue reveals that TWC's common oral sales practices do not in fact satisfy its "statutory obligation to solicit an affirmative request by the customer."

According to the plain language of the statute, and the 7th Circuit Court of Appeal in *Doyle*, to comply with §543(f), TWC must "solicit an affirmative request" from its customers for any equipment for which it charges the customer. Providing the customer with a "general description of the services provided," and informing them that "additional equipment charges" may apply, is simply not enough. TWC has admittedly failed to solicit or obtain the required affirmative request, presumably because it has simply been too "cumbersome and confusing" for it to do so. It is simply no defense to the systematic violation of a consumer protection statute for TWC to say that compliance with the plain language of the statute is too "cumbersome and confusing." Even if the Commission looks to TWC's alleged oral sales practices and renders an opinion as to whether those practices comply or do not comply with §543(f), an honest look at those practices reveals that TWC has simply failed to adhere to the express words of the statute and has systematically violated the Cable Act's negative option billing prohibition.

VI. No Prior Judicial or Administrative Interpretation of Section 543(f) Has Permitted A Cable Operator To Charge A Subscriber For Equipment Without Their Affirmative Request

The Commission decisions relied on by TWC do not support TWC's interpretation and do not require a re-wording of the statute. The Commission has consistently analyzed situations presented to it by first determining whether a particular business practice even falls within the negative option billing prohibition. If it does, such as charging a customer for equipment, then the plain unambiguous words of the statute apply. In such situations, the Commission has never held that anything less than an "affirmative request by name" is required.

The Commission cases cited by TWC do not stand or fall on an interpretation of the term "affirmative request by name," but rather on whether the business practice at issue falls within the type of conduct §543(f) seeks to prohibit. The correct inquiry in any case is whether a particular business practice is subject to the affirmative request requirement. If it is, then an affirmative request by name is required. In this case, there can be no doubt that charging customers for equipment is subject to §543(f)'s "affirmative request" requirement. The only remaining question, then, is whether TWC obtains an affirmative request from its customers before charging them. The evidence reveals that it does not.

Time Warner's reliance on *Time Warner Cable v. Doyle* 66 F.3d 867 (7th Cir. 1995) is entirely misplaced. An accurate reading of the Court's opinion in *Doyle* compels the conclusion that it directly supports Plaintiffs' contention that §543(f) unambiguously requires TWC to obtain an affirmative request by name for equipment before it may charge its subscribers for that equipment.

In September of 1993, in Wisconsin, Time Warner restructured its service tiers and unbundled or removed certain channels from its basic tier. *Id.* at 870. This conduct was specifically authorized by regulation, 47 C.F.R. § 76.981(b):

> (a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.
>
> (b) **The requirements of paragraph (a) of this Section shall not preclude** the adjustment of rates to reflect inflation, cost of living and other external costs, **the**

> **addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service** . . . provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service . . . .

47 C.F.R. § 76.981 (Emphasis added.) Thus, 47 C.F.R. § 76.981(b) expressly authorized Time Warner to add or delete programs from a service offering, which is exactly what it did. 47 C.F.R. § 76.981(b) provided TWC an express regulatory exception to paragraph (a)'s requirement for an "affirmative request by name." Here, in sharp contrast, no such regulatory exception for equipment exists. Clearly, no provision in any regulation authorizes a cable operator to charge subscribers for cable equipment without first obtaining their affirmative request for equipment.

Moreover, the *Doyle* Court's conclusion regarding any need for the FCC's interpretation of §543(f)'s "affirmative request by name" requirement was only with respect to the situation where a cable operator engaged in such conduct as unbundling or relabeling services or tiers. Specifically, the court concluded:

> However, the statutory language does not, by its own force, answer the question of whether the unbundling or the mere relabeling of existing services was intended to trigger **the statutory obligation to solicit an affirmative request by the customer** before the service can continue.

Id. at 877. (Emphasis added.) The language of §543(f) clearly says nothing about whether a cable operator must obtain a subscriber's affirmative request to unbundle or bundle services or to add or delete channels that do not fundamentally change the nature of the service. As such, and only because §543 was silent on this specific issue, did the FCC feel it was proper to offer its guidance. In the present case no such ambiguity is present. Here, §543(f) specifically and clearly states that "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." "Equipment" is specifically listed as something for which the statute requires an "affirmative request by name" before the cable operator may charge for such equipment. Moreover, there is no regulatory exception to this requirement as existed in *Doyle.* As such, the first rule of statutory interpretation applies. The words of the statute requiring an affirmative request ***for equipment*** by name are clear and unambiguous. No further interpretation is necessary or proper. *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082.

In fact, *Doyle* strongly supports Plaintiffs' claim and interpretation of §543(f). The *Doyle* Court recognized that ***§543(f) triggers a "statutory obligation to solicit an affirmative request by the customer."*** The statutory obligation to solicit or obtain an affirmative request by the customer was never in question. The only question in *Doyle* was whether unbundling and rearranging tiers triggered that statutory obligation. Clearly, it did not. Based in large part, if not entirely, on the specific regulatory exception found in 47 C.F.R. § 76.981(b), *Doyle* concluded that no such statutory obligation was in fact triggered.

Here, that same "statutory obligation to solicit an affirmative request by the customer" recognized by the *Doyle* Court, ***is triggered*** where the cable operator charges the subscriber for equipment. The words of the statute and regulation expressly and specifically so provide, and no regulatory exception states otherwise. As such, *Doyle* can be fairly read to stand for the proposition that the express words of §543(f) ("A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name"), triggered TWC's statutory obligation to solicit and obtain an affirmative request by name from its subscribers for their equipment prior to them being charged for it.

TWC's remaining arguments that center on the supposed burdens imposed by compliance with the express terms of the statute and regulation are without basis. The analysis of those burdens under the circumstances presented in *Doyle* are entirely different from a situation where a customer is being charged for equipment he or she did not request, as opposed to where a cable operator is merely restructuring a tier that has no fundamental impact on the nature of the service.

VII. CONCLUSION

TWC, having failed and refused to conform its conduct to comply with the express requirements of the Cable Act, now, 18 years after its enactment, asks the Commission to essentially re-write the words of the Cable Act's negative option billing prohibition to retroactively fit the unlawful way in which it has chosen to bill its customers for converter boxes and remote controls. Nothing in the law permits such a strained and self-serving interpretation.

For the reasons set forth above, Plaintiffs respectfully request that the Commission either:

(1) Refrain from rendering an opinion or issuing a Declaratory Ruling on the matters set forth in TWC's Petition; or,

(2) Find that 47 U.S.C. §543(f) requires an "affirmative request by name," as the plain, unambiguous language dictates; and,

(3) Find that TWC's integrated contract documents do not satisfy its "statutory obligation to solicit an affirmative request" from its customers; and, if the Commission looks beyond the contract documents; and,

(4) Find that TWC's common sales practices, as described in Exhibit 1 to the Declaration of William H. Johnson, do not comply with TWC's "statutory

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obligation to solicit an affirmative request" from its customers.

November 9, 2010

DOUGLAS CAIAFA, APLC
LAW OFFICE OF CHRISTOPHER J. MOROSOFF

By: ______________________
Douglas Caiafa, Attorneys for Plaintiffs

DECLARATION OF DOUGLAS CAIAFA

I, DOUGLAS CAIAFA, declare as follows:

1. That I am an attorney at law duly licensed to practice before the Superior Court of California and am one of the attorneys of record for Plaintiffs Mark Swinegar and Michele Ozzello-Dezes in the action entitled: *Mark Swinegar et al. v. Time Warner Cable, Inc.*, L.A.S.C., Case No. BC389755. I have personal first-hand knowledge of the matters set forth herein and if called upon to testify, I could and would competently testify to the facts set forth hereunder.

2. I make this Declaration in support of Plaintiffs' Opposition to Time Warner Cable, Inc.'s Petition for Declaratory Relief filed with the Federal Communications Commission on October 7, 2010.

3. Attached hereto as Exhibit "1" is a true and correct copy of is a true and correct copy of Plaintiffs' Second Amended Complaint.

4. Attached hereto as Exhibit "2" is a true and correct copy of Order Re Time Warner Cable Inc.'s Motion for Summary Judgment dated July 29, 2010.

5. Attached hereto as Exhibit "3" is a true and correct copy of Plaintiffs' Separate Statement of Undisputed and Disputed Material Facts, dated April 20, 2010.

6. Attached hereto as Exhibit "4" is a true and correct copy of the relevant portions of the deposition of Adrina Smith, a CSR of TWC.

7. Attached hereto as Exhibit "5" is a true and correct copy of Order Overruling Demurrer To Second Amended Complaint dated February 23, 2009.

8. Attached hereto as Exhibit "6" is a true and correct copy of TWC Subscriber Agreement